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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20, SUBREGION 37

HTH CORPORATION, PACIFIC BEACH CORPORATION, and KOA MANAGEMENT, LLC, a SINGLE EMPLOYER, dba PACIFIC BEACH HOTEL, Respondents, and HTH CORPORATION dba PACIFIC BEACH HOTEL,	CASE NOS.:	37-CA-7311 37-CA-7334 37-CA-7422 37-CA-7448 37-CA-7458 37-CA-7476 37-CA-7478 37-CA-7482 37-CA-7484 37-CA-7488 37-CA-7537 37-CA-7550 37-CA-7587
and KOA MANAGEMENT, LLC dba PACIFIC BEACH HOTEL,	CASE NO.:	37-CA-7470
and PACIFIC BEACH CORPORATION dba PACIFIC BEACH HOTEL,	CASE NO.:	37-CA-7472

and INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142, Union.	CASE NO.: 37-CA-7473 **RESPONDENTS' EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION; RESPONDENTS' BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION; CERTIFICATE OF SERVICE** Hearing: Judge: James Kennedy Date: November 4-12, 2008 February 19-27, 2009 Time: 9:00 a.m

RESPONDENTS' EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

Pursuant to Section 102.46 of the National Labor Relations Board's ("NLRB") Rules and Regulations, as amended, Respondents HTH Corporation, Pacific Beach Corporation, and KOA Management, LLC (collectively "Respondents") take the following exceptions to the Decision issued by Administrative Law Judge James M. Kennedy on September 30, 2009 ("Decision").

A. Judge's Order for Respondents to recognize and bargain with the International Longshore and Warehouse Union, Local 142 ("Union") *(See Decision at 47:41-46)*

B. Judge's refusal to admit evidence of the Union's loss of majority support *(See Transcript of Proceedings, pages 1830-54; Decision at 39:4-17)*

C. Judge's finding that Respondents were not presented with an uncoerced disaffiliation petition *(See Decision at 39:13-14)*

D. Judge's finding that the Union has represented a majority of Hotel employees since August 15, 2005 *(See Decision at 45:19-20)*

E. Judge's finding that Respondents bargained in bad faith (*Decision at 45:26-27)*

F. Judge's finding that Respondents used PBH Management, LLC ("PBHM") as a middleman in a scheme to deprive employees of Union representation (*Decision at 45:33-36)*

G. Judge's finding that Respondents cancelled the Management Agreement with PBHM for anti-union purposes *(Decision at 41:5-7 & 45:37-38)*

H. Judge's finding that Respondents were obligated to bargain with the Union while PBHM was in charge of the Hotel *(Decision at 45:28-32)*

I. Judge's finding that Respondents unlawfully withdrew from the Union on December 1, 2007 *(Decision at 45:43-45)*

J. Judge's finding that Respondents had a duty to provide information regarding negotiations while PBHM was in charge of the Hotel *(Decision at 46:23-28)*

K. Judge's finding that unilateral changes made by Respondents were unlawful *(Decision at 45:46 – 46:22)*

L. Judge's finding that Respondents discharged seven employees because of Union animus *(Decision at 46:30-34)*

M. Judge's finding that Respondents "polled/interrogated" employees *(Decision at 46:35-37)*

N. Judge's finding that Respondents threatened employees with job loss *(Decision at 46:40-44)*

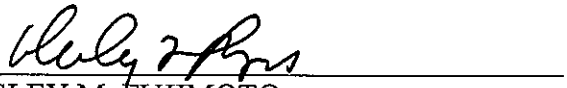
O. Judge's decision to extend certification for one full year *(Decision at 44:4-5)*

P. Judge's decision to order extraordinary remedies *(Decision at 44:1-46 & 48:33 - 49:14)*

Q. Judge's decision to order a broad cease and desist order *(Decision at 44:33-35 & 47:6-37).*

DATED: Honolulu, Hawaii, October 28, 2009.

IMANAKA KUDO & FUJIMOTO



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RESPONDENTS' BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

I. STATEMENT OF THE CASE

The Administrative Law Judge's ("Judge") refusal to allow the employees of the Pacific Beach Hotel ("Hotel") to testify at the hearing thereby depriving them of the opportunity to

exercise their Section 7 rights under the Act to state under oath that they did not want to join or be represented by the International Longshore and Warehouse Union, Local 142 ("ILWU" or "Union") was clearly erroneous and led the Judge to reach other erroneous findings and conclusions.

The Judge ordered Respondents (and therefore, the employees) to (a) recognize the ILWU as the exclusive bargaining representative of the Hotel employees and (b) bargain with the ILWU for one additional year despite actual proof that the majority of employees rejected the Union, as evidenced by a petition signed by 62% of the employees stating "We the employees of the Pacific Beach Hotel do not want to join the ILWU or any union." This petition was circulated and signed by Hotel employees in Spring/Summer 2008. The hearing in this matter was heard in November 2008 and February 2009, *after* the employees had already rejected representation by the ILWU. During the hearing, and for reasons that are still unclear, the Judge did not allow the Hotel employees to testify on the petition and their lack of support of the Union. After making the ruling excluding the testimony and evidence, the Judge issued his Decision ordering Respondents (and the employees) to recognize the Union and the employees to accept representation by a union they clearly do not support or want.

Specifically, during the hearing, employees were prepared to testify that the majority of Hotel employees did not want to be represented by the ILWU. The employees worked in the various departments throughout the Hotel, and had spoken with co-workers in their respective departments about the Union on several occasions. From speaking with their co-workers, it was clear that the general consensus at the Hotel was the employees did not want to be represented by the Union. The employees were disgruntled because the Union instigated two boycotts at the Hotel, and the Union hurt the employees instead of helping them. With this knowledge in mind,

the employees circulated a disaffiliation petition stating they did not want to be represented by the ILWU, and that petition was signed by a majority of the Hotel employees.

When several of the employees attempted to testify at the hearing, however, the Judge ruled that the testimony regarding their anti-union sentiment and the petition was "irrelevant" to the proceedings. Despite repeated arguments by Respondents' counsel that such information was (a) clearly admissible and (b) relevant to the issue of whether the Union had majority support of the workforce, the Judge refused to allow such testimony into the record. In response, Respondents filed an *Offer of Proof, or in the Alternative, Motion in Limine*, to preserve its record.

Such evidence, however, was very relevant – and in fact, necessary – to the proceedings because it addressed the main issue in this case: Does the Union have majority support of the employees? If the Union did not have the support, Respondents could not be ordered to recognize and bargain with the Union; such an order would violate the Section 7 rights of the employees.

One of the main purposes of the Act is to protect the Section 7 rights of employees. *See Charbonneau Packing Corp.*, 95 NLRB 1166 (1951). This includes the rights of employees to either join or *refrain from joining* a labor organization. *See 29 U.S.C. § 157.* By signing the petition, the employees at the Hotel provided *actual proof* that the Union had lost the support of the majority of the employees. These employees were then prepared to present such testimony and evidence during the hearing. Contrary to Board law, however, the Judge ruled that such evidence was "irrelevant" to the proceedings.[1] The Judge created artificial legal hurdles to

[1] Curiously, the Judge rejected such evidence *sua sponte*. Neither the General Counsel nor the Charging Party made an objection to such evidence.

justify his refusal to allow the testimony of the employees. Therefore, these employees were deprived of their right to testify, their voices were silenced, and their petition was in vain.

Accordingly, Respondents file these exceptions as it was clearly erroneous for the Judge to order Respondents and the employees to accept the ILWU as the employees' exclusive bargaining representative by first refusing to allow the employees to testify that they believed the Union had lost the support of the majority of the employees. By doing so, it appears the Judge had tipped his hand that he already planned to rule against the Respondents.[2] Such prejudicial actions in addition to other erroneous findings and conclusions were clearly erroneous and each will be addressed in detail below.

II. ARGUMENT

This brief addresses three sets of errors made by the Judge. First, the Judge erred by ordering Respondents to recognize and bargain with the Union, even though the Union is *not* supported by a majority of the employees. As discussed in detail below, 62% of Hotel employees signed a union disaffiliation petition that expressly stated they did not want to be represented by the Union and a number of the employees were able and willing to testify on their sentiment but were not allowed to do so by the Judge. This petition and disallowed testimony constitute proof that the Union lost the majority support of the employees. Therefore, it was erroneous for the Judge to order Respondents to recognize a Union that was not supported by the employees.[3]

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[2] Through his actions, it appears the Judge had already made up his mind that he would order Respondents to recognize and bargain with the Union, and he wanted to preclude any evidence that would prevent him issuing such an order.

[3] Respondents have filed an accompanying Motion to Remand and Reopen the Record pursuant to Section 102.48(d)(2) of NLRB Rules and Regulations. The Motion seeks an opportunity to submit testimony and evidence – from the employees themselves – that the majority of Hotel employees do not want to be represented by the Union.

Second, the Judge also erred in finding that Respondents committed certain alleged unfair labor practices. The evidence in the record simply does not support the Judge's findings. Each of the Judge's errors are discussed in more detail below.

Third, the remedies ordered by the Judge were also erroneous. Even assuming *arguendo*, Respondents should be required to bargain with the Union, it should not be for one year. Additionally, the extraordinary remedies ordered by the Judge were neither proper nor warranted in this case.

A. It Was Erroneous For The Judge To Order Respondents To Recognize And Bargain With The Union, Because The Union Does Not Have Majority Support Of The Employees

The Judge has ordered Respondents to recognize a Union that is not supported by the majority of employees. By doing so, the Judge effectively ordered the employees to accept the Union as their exclusive bargaining representative – for a period of one year – despite their clear and unequivocal proclamation that they do not want to be represented by the Union.

To make matters worse, before making such ruling, the Judge also precluded a number of Hotel employees from testifying about the lack of employee support for the Union. Specifically, the Judge literally precluded any and all testimony or evidence that would have shown that the Union lost the majority support of employees. The Judge did allow, however, evidence from the General Counsel that the Union did have majority support of the Union at some point. The reasons for the Judge's evidentiary rulings are unclear; what is clear, though, is that such rulings were clearly erroneous. As a result, the Judge's order that the Respondents – and employees – must recognize the Union is also clearly erroneous, because it is based upon an incomplete and one-sided record.

1. The Judge Erred By Refusing to Admit Evidence of the Union's Loss of Majority Support

One of the main issues in this case was whether Respondents (and the employees) must recognize the ILWU as the exclusive bargaining representative of the Hotel employees. The ILWU's certification year expired in August 2006, and the ILWU's majority support by the Hotel employees has been a subject of great dispute. In this proceeding, the General Counsel and Union argued that the Union has not lost majority support of the employees, and therefore, should be recognized as the exclusive bargaining representative of the Hotel employees. The Respondents (and employees) countered that the Union has indeed lost majority support of the employees, as evidenced by numerous indicia, including a disaffiliation petition signed by 62% of the employees. Therefore, Respondents argued that it should no longer be required to recognize the ILWU as the exclusive bargaining representative of the employees.

During the hearing, the Union was permitted to submit evidence that the Hotel employees may have supported the Union at some point, including testimony about a petition that was purportedly signed by 70% of the Hotel employees in or about April 2006.[4] *Transcript of Hearing at 331:20* (hereinafter "*Tr. at page:line.*"). The Judge even made reference to this petition in his Decision. *Decision at 10:18-19.*

During the Respondent's case-in-chief, however, Respondents were not permitted to submit any evidence to the contrary. Specifically, Respondents were prepared to present evidence that the ILWU had lost majority support of the employees. *Tr. at 1830-1860 and Respondents' Exhibit 12 (*hereinafter "*R-__.*"*).* For example, several Hotel employees were prepared to testify that the majority of employees at the Hotel did *not* want to be represented by

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[4] The Union's majority support had always been in doubt, because the Union won its certification election by just one vote, and a large contingent of the workforce did not vote in the election.

the ILWU. The employees believed certain actions by the ILWU had a negative impact on the employees' livelihood, and therefore, they did not want to be represented by the ILWU. *Id.* The employees were upset because the ILWU instigated two boycotts of the hotel, and as a result, business at the Hotel declined dramatically.[5] *Id.* As a result of the boycotts, the employees were affected personally because they lost hours, wages and tips due to the decrease in business. *Id.* Therefore, the employees were upset or disgruntled with the ILWU's antics, and they decided they did not want to be represented by the ILWU. *Id.*

Naturally, as the employees became upset and disgruntled with the ILWU, they began to discuss the ILWU's actions amongst themselves. *Id.* It soon became very clear that the general consensus among the employees was they did not support the ILWU's antics, and in turn, did not support the ILWU. *Id.* In fact, some employees had gone straight to the ILWU and asked them to stop the boycotts, but their requests were quickly rejected. *Id.* This angered the employees even more. *Id.*

At some point, some employees decided to create and circulate a petition that denounced support of the ILWU. The petition stated: "We the employees of the Pacific Beach Hotel do not want to join the ILWU or any union." *See R-12.* This petition was circulated amongst the Hotel employees, and in just a few weeks time, 227 employees – or 62% of the workforce – signed the petition. *Id.* This petition was later presented to the Respondents. *Id.*

During the hearing, as one of the employees – Stuart Fishel – started to testify about the employees' anti-union sentiment at the hotel, the Judge made a *sua sponte* ruling that such

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[5] The first boycott was designed to convince local communities and organizations not to patronize the Hotel. This part of the boycott resulted in a loss of banquets, dining, and rooms reservations at the hotel. The second boycott involved the ILWU convincing a Japanese delegation to not patronize the Pacific Beach Hotel. The Hotel's business has always been largely dependent on its Japanese clientele, and the Japanese boycott caused a loss of business at the hotel.

testimony was "irrelevant" to the proceedings. *Tr. at 1856:23-24.* The Judge ruled that such evidence proposed by Respondents was "irrelevant" despite previously allowing very similar testimony about the ILWU's own petition from a witness presented by the General Counsel. *Tr. at 1856:23-24.*

In response, Respondents made an offer of proof regarding what the employees would testify about. *R-12.* Specifically, the employees were prepared to testify that all the Hotel employees were talking about the ILWU and the boycotts, and the majority of employees did not support the ILWU or its antics. *Id.* Based on such discussions, it was clear to the employees that the general consensus at the Hotel was the employees did not want to be represented by the ILWU. *Id.* It was also clear that the causes of the anti-union animus were the two boycotts instigated by the Union. One employee would have testified that the boycotts "really turned the tide" and caused employees to be against the Union. Another employee stated many employees who used to support the Union were now against the Union because of the boycotts. *Id.* As one employee put it succinctly: "the Union is supposed to help us, but they are just hurting us." *Id.*

Upon receiving Respondents' offer of proof, the Judge rejected such evidence as "hearsay." In response, Respondents argued that this exact same type of testimony was deemed admissible by the Board in *Levitz Furniture Co.*, 333 NLRB 717 (2001) and the United States Supreme Court in *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359 (1998). Specifically, in *Levitz*, the Board ruled that employees' "statements regarding other employees' union sentiments" were admissible in proceedings involving RM petitions. Therefore, the Board specifically ruled that statements such as "the entire night shift opposed the union" or "the employees do not want a union and that if a vote was taken, the union would lose" were admissible in an RM proceeding similar to the present case.

In addition, the Board's decision in *Levitz* was based upon a Supreme Court decision where the Court ruled an NLRB Administrative Law Judge erred by discounting an employee's opinion about the lack of union support amongst his co-workers. In its decision, the Court noted that "the most significant evidence excluded from consideration by the Board consisted of statements of two employees regarding not merely their own support of the union, but support among the work force in general." Clearly, the Supreme Court's decision supports the admission of employees' testimony about the union sentiments of the workforce in this proceeding.

Finally, it should also be noted the General Counsel's own legal memorandum, GC 02-01, dated October 22, 2001, specifically stated that "employee's unverified statements regarding other employees' antiunion sentiments and employees' statements expressing dissatisfaction with the union's performance as bargaining representative" are "now acceptable when evaluating an employer's uncertainty under the *Levitz* test."

Therefore, based on *Levitz, Allentown Mack* and the General Counsel's own legal memorandum, statements from Hotel employees that the majority of the workforce did not support the Union were clearly admissible and should have been made a part of the record in this case. Nevertheless, the Judge insisted that such evidence was not admissible.

During the hearing, the Judge also rejected any evidence regarding the disaffiliation petition by stating it would have been "tainted" because it was signed after Respondents had withdrawn recognition from the Union. *Tr. at 1840:15-19.* The Judge specified that the "presumption of taint is pretty strong at that point" under *Lee Lumber. Tr. at 1840:18-19.* In response, Respondents argued that the taint was merely "presumed," and that like all presumptions, it was rebuttable.

Respondents were then prepared to present testimony from the employees regarding their reasons for signing the petition. Specifically, while signing the petition, many of the employees stated they were upset or displeased with the ILWU because of the boycotts. They explained that when the ILWU's antics affected them personally and financially – and they lost hours, wages and tips due to the ILWU's antics – they decided they did not want to be represented by the ILWU. Therefore, they wanted to sign the petition to make it clear they did not want to be represented by the ILWU.

In addition, many of the employees actually sought out the employees who were circulating the petition and asked if they could sign the petition. They were prepared to testify that they were not tricked or coerced into signing the petition.

The Judge still rejected such evidence.

Respondents then argued that it had a right to rebut the presumption of taint, and that it could show "unusual circumstances" which led to employees signing the anti-union petition. Specifically, Respondents argued that under *Lee Lumber*, 322 NLRB 175, 177 (1996), the Board has stated:

> *In the absence of unusual circumstances*, we find that this presumption of unlawful taint can be rebutted only by an employer's showing that employee disaffection arose after the employer resumed its recognition of the union and bargained for a reasonable period of time without committing any additional unfair labor practices that would detrimentally affect the bargaining. Only such a showing of bargaining for a reasonable time will rebut the presumption.

Id. at 178. Under this language, where you have "unusual circumstances," the presumption of taint can be rebutted without resuming recognition and bargaining with a union. Rather, where "unusual circumstances" were the cause of the loss of majority, the presumption of taint is rebutted. In this case, Respondents argued that the "unusual circumstances" were the two

boycotts instigated by the ILWU and the employees' reaction to such boycotts. As the employees themselves were prepared to testify, it was the boycotts (and not the withdrawal of recognition) that made them sign the anti-union petition.

Therefore, testimony from the employees and evidence of their anti-union petition were clearly relevant to the proceedings – and, in fact, necessary to determine whether and why the ILWU lost the majority support of the employees. By refusing to accept such evidence into the record, and then ruling the Union had never lost majority support, the Judge effectively turned a deaf ear to Respondents' arguments and the sentiments of the employees.

Finally, at that point in time, any pending ULP's against Respondents were merely allegations; there had been no finding of a violation by Respondents. Therefore, it was erroneous for the Judge to rule that the petition was tainted, without (a) first finding a violation of the Act or (b) listening to evidence that could have rebutted the presumption of taint.

Therefore, in essence, the Judge has ordered Respondents (and the employees) to recognize the Union, despite knowing the Union has lost majority support of the employees. The Judge was able to reach this decision, however, because he simply ignored the fact that the majority of Hotel employees expressed their desire that they do not wish to be represented by the ILWU. This error by the Judge is significant because Respondents (and the employees) should not be forced to recognize the Union, if the Union is not supported by the employees. At the very least, the issue of the Union's lack of majority support should be based on a complete record, as opposed to the current record that is incomplete and one-sided.

2. The Judge Erred in Finding that Respondents Were Not Presented With an Uncoerced Disaffiliation Petition

In his Decision, the Judge specifically stated he denied Respondents' attempt to introduce evidence of the ILWU's loss of majority support because Respondents were not presented with

an "uncoerced disaffiliation petition." *Decision at 39:13.* This statement by the Judge is befuddling, because, as mentioned in the preceding section, that was *exactly* the type of evidence Respondents were seeking to admit into the record. As noted above, several employees were prepared to testify that the majority of Hotel employees had become disgruntled by the ILWU's antics (i.e. the boycotts) and therefore did not want to be represented by the ILWU. As a result, the employees signed a disaffiliation petition rejecting representation by the ILWU. Therefore, the Judge's reasoning for rejecting any evidence of the Union's loss of majority support is peculiar.

Perhaps, in reading the Decision, the Judge used the word "uncoerced" with a purpose. It is possible he found the petition to be "tainted" or "coerced" in some way, based on one of the unfair labor practices charged against Respondents. This finding, however, was flawed because it was based on an incomplete and one-sided record. Additionally, if the judge meant the petition was presumed to have "taint" because of pending unfair labor practices, Respondents had the right to rebut this presumption under *Lee Lumber.*

Similarly, if the Judge was implying that he presumed the petition was "coerced" in some way, Respondents have the right to rebut that presumption. Respondents, however, were never afforded that right or given the chance. Therefore, this decision by the Judge is particularly troubling, because Respondents specifically stated they had employees who were prepared to testify that they were neither tricked nor coerced into signing the anti-union petition. Rather, the employees would have testified that they were upset with the Union because of the boycotts, and therefore wanted to sign a petition stating they did not want to be represented by the ILWU. The employees felt that the ILWU's antics affected them personally and financially – and they lost

hours, wages and tips due to the ILWU's antics – they did not want to be represented by the ILWU.

Therefore, it was clearly erroneous for the Judge to conclude Respondents were not presented with an *uncoerced* disaffiliation petition, without first hearing the testimony from the employees about why they signed the petition. By so ruling, the Judge effectively created an incomplete and one-sided record to support his ultimate findings.

3. The Judge Erred in Finding the ILWU Has Represented a Majority of the Hotel Employees Since August 15, 2005

For similar reasons, the Judge's finding that the ILWU has had the majority support of employees since August 15, 2005 is also based on an incomplete and one-sided record. Specifically, the Judge rejected the testimony of several hotel employees who were prepared to present testimony and evidence that would have shown the Union has actually lost the majority support of the employees. The employees were prepared to testify that the majority of employees at the Hotel did not want to be represented by the Union, and this sentiment was confirmed by an anti-union petition signed by 62% of the employees. For some reason, however, the Judge excluded such testimony and evidence from the record.

This ruling by the Judge was particularly significant because he would not have been able to order Respondents to recognize or bargain with the ILWU if he found the ILWU had lost majority support of the employees. One of the only ways for the Judge to order Respondents to recognize the Union would be to discredit any evidence that the ILWU had lost majority support of the employees. In this case, the Judge took it one step further – he never let such evidence into the record. Such a decision was clearly erroneous.

B. The Judge's Findings That Respondents Committed Unfair Labor Practices Are Also Erroneous

All unfair labor practice charges in this case were contingent upon the General Counsel proving Respondents were in a joint-employer, agency, or successor employer relationship with an entity called PBH Management, LLC ("PBHM").[6] The Judge's decision, however, is void of any such findings. Without such a finding, all unfair labor practices, as alleged, must be dismissed.

Additionally, with regards to the merits of the alleged unfair labor practices, the Judge found that Respondents committed certain unfair labor practice violations. The Judge's findings, however, are contrary to the record and Board law. The Judge's erroneous findings are discussed in more detail below.

1. All Unfair Labor Practices Charges Should Be Dismissed Because the Judge Did Not Find Respondents to Be in a Joint-Employer, Agency, or Successor Employer Relationship With PBHM

As a bit of background, PBHM operated the Hotel from January 1 through November 30, 2007. During that time, PBHM – and not the Respondents – was the employer of the Hotel employees.

As the unfair labor practices in this case are alleged to have occurred in 2007, the General Counsel has pursued two theories of employer liability against Respondents. First, the General Counsel has argued that Respondents were a joint-employer with PBHM from January 1 – November 30, 2007. Under this theory of employer liability, the General Counsel has pursued certain unfair labor practice charges. Second, and in the alternative, the General Counsel has also argued that Respondents were a successor employer to PBHM, as of December 1, 2007, the

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[6] PBHM operated the Hotel from January 1, 2007 through November 30, 2007.

day Respondents took over operations of the Hotel. Under this theory of employer liability, the General Counsel has pursued a different, and smaller, set of unfair labor practice charges.

As noted at the very outset of Respondents' post-hearing brief, and as clearly delineated in the Complaint in this case, all allegations of unfair labor practices against Respondents in this case were contingent upon the General Counsel proving that Respondents should be liable for the alleged unfair labor practices under one of the two theories of employer liability. Accordingly, if the General Counsel is unable to prove Respondents were a joint-employer or successor employer with PBHM, the alleged unfair labor practice charges must be dismissed.

In this case, the Judge did not find Respondents were either a joint-employer or a successor employer with PBHM. Specifically, the Judge did not find Respondents to be a joint-employer with PBHM. Indeed, he could not have, because the record does not support such a finding. The Judge also did not find Respondents to be in an agency relationship with PBHM. Although he has stated Respondents' arrangement with PBHM was a "scheme" or a "sham," he never concluded Respondents' were in an agency relationship with PBHM. The Judge's Decision is absolutely void of any such finding. Finally, the Judge also did not find Respondents to be a successor employer to PBHM. In fact, in parts of his Decision, the Judge implied that Respondents could not be a successor to PBHM because the arrangement with PBHM was a "scheme." Nevertheless, there has been no finding that Respondents were a successor employer to PBHM.

Therefore, without finding the relationship between Respondents and PBHM was that of joint-employer or successor employer, the Judge could not find Respondents committed any of the alleged unfair labor practices. Indeed, all unfair labor practices alleged in this case were

dependent on a finding that Respondents fell into one of the two theories of employer liability. Without such a finding, the unfair labor practices alleged in the Complaint must be dismissed.

2. The Judge's Finding that Respondents Bargained in Bad Faith Is Not Supported by the Record

Notwithstanding the Judge's failure to determine whether Respondents were a joint-employer or successor employer to PBHM, the Judge still found Respondents had not bargained in good faith with the Union. The Judge's finding is contrary to the record. Specifically, Respondents bargained with the Union for over one year; negotiations started in November 2005 and lasted until December 2006. *Tr. at 201.* During that time, Respondents and the Union met for approximately 36 negotiating sessions and reached tentative agreements on 170 different issues. *Tr. at 187, 201 and 316; see also GC-17.* The tentative agreements were reached throughout the entire course of negotiations and not all at once. *Tr. at 316.* When negotiations ended, only a few issues were left unresolved. *Tr. at 316.*

In finding Respondents did not bargain in good faith with the Union, the Judge appeared to have focused on several minor and isolated incidents. For example, the Judge noted that Respondents proposed a series of "ground rules" for the negotiations; at the same time, however, the Judge never stated such ground rules were unlawful. *Decision at 9:28-32.* In addition, the Judge glanced over the fact that the ILWU expressly agreed to these ground rules. *Decision at 9:32.* A close look at the ground rules reveals they were innocuous and served to facilitate the negotiating process – one ground rule was the parties would each have one spokesperson (Robert Minicola for the Respondents and Dave Mori for the ILWU); another ground rule was the parties would negotiate non-cost items first and cost items second. *Tr. at 203.*

In addition, the Judge pointed out that Respondents did not waiver on their positions on (a) union recognition, (b) dues deduction, and (c) arbitration. *Decision at 5-8.* What the Judge

failed to mention, however, was negotiations on those three issues were deferred at the suggestion of the Union. *Tr. at 325-26.* Specifically, Mori, the ILWU's spokesperson, suggested the parties defer negotiations on these three issues until they reached agreement on all other non-cost issues first. *Id.* Therefore, it was incongruous for the Judge to find Respondents bargained in bad faith, based on their position on these three provisions, when negotiations on these three provisions were deferred at the suggestion of the ILWU.

Additionally, the Judge also concluded Respondents were bargaining in bad faith because they insisted upon a broad management rights clause. *Decision at 6.* He stated that insisting on a broad management rights clause, along with their position on other issues, meant Respondent's bargaining was "all of a piece." *Decision at 8:41.*

Finally, the Judge pointed out Respondents were insistent upon having an open shop provision and rejected the Union's request for a union shop.[7] *Decision at 10:10.* What the Judge ignored, however, was the Respondents' position on the open shop provision was for good reason. As even Mori himself testified, Respondents' reason for an open shop provision was at least half of the Hotel employees did not want to be represented by the ILWU and did not want to pay dues to the ILWU. *Tr. at 327.* On the other hand, the Union rejected Respondents' proposal for an open shop simply because "out of the 200 contracts that the ILWU had negotiated with other employers, that [it] had no contract with an open shop." *Tr. at 219.* Therefore, it was erroneous for the Judge to find bad faith bargaining based upon an insistence of an open shop provision. At least Respondents had a valid reason for insisting on an open shop; the Union did not agree to an open shop simply because they had "never done it before." If anything, the Union was bargaining in bad faith.

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[7] The Union later suggested an agency shop provision.

Under Board law, the issue of whether a party has bargained in good faith or bad faith is measured under a "totality of conduct" standard. *See Matanuska Elec. Ass'n, Inc.*, 337 NLRB 680 (2002)("good faith or the lack of it depends upon a factual determination based on overall conduct."). Isolated instances of misconduct will not be viewed as a failure to bargain in good faith. *Id.*

In this case, the totality of circumstances indicates Respondents did *not* bargain in bad faith. First, Respondents met with the Union for 36 bargaining sessions over the course of one year. Second, during that time, Respondents reached tentative agreements on 170 different issues. Third, while Respondents *technically* did not waiver on their position on three provisions, it was only because the Union suggested the parties defer on those provisions until a later date.

In addition, the fact that Respondents did not waiver on their positions on certain provisions does not mean they were bargaining in bad faith. For example, under Board law, an employer's insistence on an open shop provision does not equate to bad faith bargaining. *See APT Medical Transportation*, 333 NLRB 760 (2001). Similarly, insistence on refusing to include a dues check-off provision in a contract is not conclusive evidence of bad faith bargaining. *See American Thread Co.*, 274 NLRB 1112 (1985)(ruling employer did not engage in bad faith bargaining by refusing to agree to dues check-off provision). Additionally, the Board has also ruled that an employer's refusal to agree to an arbitration provision does not constitute bad faith bargaining. *See APT Medical*, supra at 768 (finding that employer's refusal to agree to the use of a neutral arbitrator to resolve grievances was not, by itself, evidence of bad faith.). *See also Dish Network Service Corp.*, 347 NLRB No. 69 (2006)(Board ruled that employer's rejection of an arbitration provision was not unlawful.). Finally, the Board has ruled

that while insisting on a broad management rights clause may be "hard bargaining," it does not constitute bad faith bargaining. *See Coastal Electric Coop.*, 311 NLRB 126 (1993)(noting that "insistence on a broad management rights clause is not itself inherently unlawful or evidence of bad faith.").

Clearly, under the totality of circumstances, Respondents cannot be said to have bargained in bad faith. Rather, the negotiations proved to be rather fruitful, with 170 signed tentative agreements, and just a few issues left unresolved. In addition, many of the Judge's criticisms of Respondents' bargaining were unwarranted, because, at the most, they would be considered minor or isolated instances of misconduct. Any such isolated instances of possible misconduct are insufficient to negate Respondents' overall good faith bargaining. *Matanuska Elec.,* supra. Therefore, the Judge's conclusion that Respondents bargained in bad faith was erroneous.

3. The Judge Erred By Finding Respondents Utilized PBHM as a Middleman as Part of a Scheme to Deprive Employees of Union Representation

As noted, the Judge did not find Respondents to be a joint-employer or a successor employer to PBHM. Somehow, however, he did conclude Respondents used PBHM as a middleman as part of a "scheme" to thwart the Union. This finding by the Judge was not supported by the record. If anything, the record clearly indicates that Respondents and PBHM had a somewhat contentious relationship (which is why it ended) and under no circumstances did Respondents use PBHM as a "middleman" or as part of a "scheme."

a. Contrary to the Judge's Findings, Respondents Did Not Retain Control Over Operations and Negotiations When PBHM Was in Charge

The Judge's finding that Respondents retained control over the operations of the Hotel and negotiations for a collective bargaining agreement in 2007 is completely contradicted by the

record. Specifically, the Judge based this conclusion on his erroneous finding that Respondents had the right "to select PBHM's general manager" and that Respondents maintained control over PBHM's ability to negotiate a collective bargaining agreement with the Union. First, Respondents did not select PBHM's general manager. Rather, Respondents simply maintained the right to approve who PBHM hired as the initial general manager for the hotel. Surely, as Respondents still owned the hotel, it had an interest in ensuring that PBHM hired someone who was qualified for the position. *Tr. at 1928.* Additionally, retention of the right to approve the general manager was a "very common" practice in the hotel industry. *Tr. at 1929.* In this case, Respondents approved the very first person PBHM selected for the position. *Tr. at 1931.* This can hardly be considered having "the right to select PBHM's general manager."

Second, Respondents did not maintain control over PBHM's ability to negotiate a collective bargaining agreement. Specifically, PBHM entered into several tentative agreements with the Union, and it is undisputed they did not discuss the contents of any of those tentative agreements with Respondents before signing such agreements. *Tr. at 538.* Likewise, Respondents did not ask to see or review any of the tentative agreements reached between PBHM and the Union before they were signed. *Tr. at 568.* Finally, the record is very clear that Respondents were not involved in the negotiations in any way during the time PBHM was running the Hotel. *Tr. at 242.*

The Judge's conclusion was also based on very innocuous findings that can hardly constitute Respondents maintaining control over the Hotel operations. For example, the Judge pointed out that Respondents required PBHM to hire all of its employees in the same or a substantially equivalent job position. This arrangement was simply intended for PBHM to assume the property as "status quo." *Tr. at 93.* PBHM projected it could and would operate the

Hotel at either the same or a higher occupancy level than Respondents. *Tr. at 1966.* Therefore, because the occupancy – or business – at the Hotel would either stay the same or increase, PBHM could keep all of the employees. *Tr. at 1967.* The hiring of all hotel employees was just based on PBHM's projections, however, and PBHM was free to subsequently make any adjustments to the staffing levels as they saw fit. *Tr. at 1967.*

Additionally, the Judge also noted that PBHM was required to hire Respondents' Food and Beverage Director. The Judge's reliance on this finding, however, is inconsequential to whether Respondents retained control over the Hotel operations. Specifically, PBHM did not have experience operating Food and Beverage outlets, and the Hotel had three different restaurants at the time. *Tr. at 95 & 1956.* Therefore, Respondents wanted to ensure that PBHM had an employee who knew how to operate the restaurants. *Tr. at 1956.* Moreover, the Food and Beverage Director can hardly be considered a position that would have an impact on whether Respondents maintained control over the Hotel, at least not in regards to labor relations. Rather, the Food and Beverage Director's task was to provide expertise and service on the food and beverage operations. *Tr. at 95.*

Clearly, the Judge's bases for finding Respondents maintained control over the operations of the Hotel and the contract negotiations in 2007 are erroneous. During that time, PBHM was the employer of record, and it had full authority to operate the Hotel and negotiate a collective bargaining agreement with the Union. Any finding otherwise is simply contradictory to the record in this case.

b. The Judge's Finding that Respondents Cancelled a Management Agreement With PBHM for Anti-Union Purposes is Contrary to the Record

Respondents cancelled the management agreement with PBHM for legitimate business reasons. Specifically, from the very outset, PBHM displayed its inability to perform up to

expectations. For example, throughout 2007, Respondents held monthly meetings with PBHM to review the hotel's monthly performance and financial situation. *Tr. at 1986.* During each meeting, PBHM presented Respondents with a Financial Summary report that detailed the monthly and year-to-date figures for income and expenses. *See R-15.* Initially, the monthly financial reports contained a breakdown of the market segment and other variance information, i.e. the revenue generated from visitors arriving from the mainland United States, from International travel, and from Japan. *See R-15.* Because the Hotel's business came primarily from Japan, the financial reports identified and separated the information about Japan from the rest of the international travelers. *Id.* In addition, the Hotel also funded the Japan office through a commission of 2.5% of revenues that came from the Japanese wholesale market. *Tr. at 2056.*

Based on its own financial reports, PBHM's performance in the first four months was abysmal. Specifically, for January 2007 alone, PBHM was behind its projected revenue by $163,452.00. *See Id.* After February 2007, PBHM was $654,047.00 behind its projected revenue. *Id.* After March 2007, PBHM was $252,328 behind its projected revenue, which indicated some signs of improvement. *Id.* After April 2007, however, PBHM was behind the projected revenue by $843,664.00. *Id.* After just four months of operations, it was evident PBHM could not meet its expectations or "rosy predictions." *Id.*

During the hearing, PBHM representatives admitted the revenue had been poor, but tried to explain itself by stating profits had increased. *Tr. at 391.* As Mr. Minicola explained, however, this "profit" was the result of PBHM's cost-cutting measures throughout the hotel. *Tr. at 2026.* According to Respondents, PBHM "leaned out the operations" and was "reducing expenses everywhere they could" in order to increase profitability, even though Mr. Minicola cautioned PBHM about the potential for serious repercussions if the equipment was not

maintained properly. *Tr. at 2026, 2033 & 2063.* Respondents were also aware of complaints by Far East clientele because of the cut backs. *Tr. at 1123.*

Yet, PBHM informed Respondents it would cut costs everywhere they could. *Tr. at 2033.* Respondents were concerned because they were still responsible for the condition of the Hotel even though another company was operating the Hotel. *Tr. at 2034.* One of Respondents' biggest concerns was the Oceanarium tank, which was the signature attraction of the Hotel. *Tr. at 2034.*

This cost-cutting measure proved to be disastrous when something went awry with the Oceanarium fish tank and approximately 80-100 fish ended up dying. *Tr. at 2040.* PBHM's reaction to the fish dying was something akin to "no big deal, we'll get you more fish." *Tr. at 2043-44.* PBHM seemed to take the situation rather lightly, even though the Hotel restaurants had customers watching as the fish were dying. *Tr. at 2044.* PBHM has also not explained what happened to the fish tank to cause the fish to die (Respondents have still not been informed as to what went wrong). *Tr. at 2044.* Prior to this incident, the Hotel had never had a similar incident in the past where numerous fish died. *Tr. at 2043.*

In addition, based on the financial reports, PBHM was not bringing enough guests to the Hotel and occupancy was getting worse. *Tr. at 2018.* Therefore, Respondents felt PBHM needed to make some improvements with the marketing of the Hotel. *Tr. at 2018.* This was troubling for Respondents, because at the time the projections were made, PBHM represented they were reasonable and attainable. *Tr. at 1076.* While operating the Hotel in 2007, however, PBHM admitted its own forecasts were not achievable. *Tr. at 1088.*

When Respondents pointed out the low occupancy numbers, PBHM's response was something akin to "we just took over, and [we] can't do anything for [Pacific Beach Hotel] for

this year, and more than likely, 2008 will be when [we] can really make a big difference." *Tr. at 2021.* The low occupancy affected not only revenue for the room reservations; it affected the revenue for restaurants and retail shops as well. *Tr. at 2018-19.* In other words, the reduced foot traffic caused by the lower occupancy meant the food and beverage outlets would get less business. *Tr. at 2003.* The decreased revenue of the retail outlets was a concern for Respondents because the Hotel's leases with the retail outlets included base rent *and* lease rent, meaning Respondents got a certain percentage of the gross revenue of their tenants. *Tr. at 2019.* Therefore, lower revenue for the retail outlets resulted in less money for Respondents. *Tr. at 2019.*

In addition, PBHM also stated that if Respondents wanted to see a "big difference" sooner, they need to pay PBHM more money. Specifically, PBHM wanted an additional fee for the domestic wholesale market, and Respondents balked because that was contrary to what the parties agreed to in the Management Agreement. *Tr. at 2022-23.* PBHM then explained that if it made any adjustments to its marketing plan in order to increase business at the Hotel, it would negatively impact business at other properties it managed, like the Waikiki Beachcomber and Ala Moana Hotel. *Tr. at 2022.* Therefore, PBHM stated it could not do anything for the Hotel that would negatively impact other hotels it was managing, unless Respondents paid PBHM more money. *Tr. at 2022.* PBHM also stated it wanted an extra fee for domestic wholesale above and beyond what was included in the Management Agreement. *Tr. at 2023.*

PBHM did not prepare a budget until April 2007, and the budget had a lot of discrepancies. *Tr. at 2030.* Mr. Minicola was not satisfied with the budget, but PBHM implemented the budget anyway. *Tr. at 2031.*

In June 2007, Respondents and PBHM held a meeting to discuss the May financials and the status of PBHM's management of the Hotel. *Tr. at 2067.* During that meeting, PBHM first started by apologizing about the Oceanarium incident. *Tr. at 2067.* PBHM also had three major topics it wanted to discuss. First, PBHM wanted to charge Koa Management a 1.5% "chain fee" for domestic wholesale bookings. *Tr. at 2068.* Mr. Minicola stated the chain fee was not part of the Management Agreement. *Tr. at 2068.*

Second, PBHM wanted to close the Shogun restaurant, or at the very least, cancel some meal periods. *Tr. at 2068.* Respondents responded that was something that needed to be discussed with their landlord, because the restaurants' leases were tied into the ground lease. *Tr. at 2069.*

Third, PBHM stated it did not want to pay a 2.5% commission that was being paid to the Japan office. *Tr. at 2069.* PBHM wanted to close the Japan office, and Respondents responded that most of the Hotel's revenue came from Japan and they could not close the Japan office. *Tr. at 2069-70.* Respondents also made it clear that any attempts to close the Japan office would be a "deal breaker." *Tr. at 2070.* PBHM insisted it was going to stop paying the 2.5% commission to the Japan office. *Tr. at 389; see also General Counsel Exhibit 41.*

On July 2, 2007, Respondents and PBHM met to discuss the financials for May 2007. *Tr. at 2075.* According to Respondents, the July meeting was "the worst meeting that [they] had." *Tr. at 2076.* First, discussions between the parties were already "heated" from the prior meeting. *Tr. at 2076.* Second, PBHM tried to introduce new budget numbers and new target numbers that would have completely disregarded its poor performance and $843,664.00 deficit from the first four months of 2007. *Tr. at 2076-77.*

In producing the new budget and target numbers, PBHM stated it wanted to "start from scratch" and forget about the first four months of business. *Tr. at 2079.* In other words, PBHM wanted to wipe out the large deficit it had built up through May 2007. *Tr. at 2080.*

On July 3, 2007, Mr. Minicola traveled to Japan to meet with John Hayashi and discuss PBHM's plans to close the Japan office. *Tr. at 2082.* After speaking with Mr. Hayashi, Mr. Minicola confirmed he would be forced to terminate the Management Agreement with PBHM if PBHM tried to close the Japan office. *Tr. at 2083.*

On July 16, 2007, PBHM sent Respondents a letter stating it would start charging Respondents a 1.5% "chain fee" and would also be canceling the 2.5% commission it was paying to the Japan office. *Tr. at 2074; see also GC-41.* The letter specifically stated PBHM would implement both matters "immediately." *Id.*

Upon receiving the letter from PBHM, Mr. Minicola spoke with Barry Wallace, Outriggers Vice President of Hospitality Services, over the telephone. *Tr. at 2085-86.* Mr. Wallace's duties with Outrigger included handling the operations and revenue for Pacific Beach Hotel through PBHM. *Tr. at 376.*

Mr. Minicola informed Mr. Wallace that Koa Management would terminate the Management Agreement if PBHM was "serious" about the contents of its letter. *Tr. at 2086.* Mr. Wallace said he would get back to Mr. Minicola, but he never did. *Tr. at 2086.*

On August 1, 2007, Respondents met with PBHM representatives to discuss the financial reports for June 2007. *Tr. at 2087; see also R-15.* For June 2007 alone, PBHM had a budget deficit of $289,000.00. *Tr. at 2087; R-15.* During this meeting, PBHM also provided Respondents with a Stellex-based report, which did not identify and separate the amount of business coming from Japan. *Tr. at 2088-89.* From viewing the report, Respondents would have

been unable to calculate the 2.5% commission that should be paid to the Japan office. *Tr. at 2089.* Mr. Minicola expressed his "*great displeasure*" with PBHM and its antics. *Tr. at 2090.*

At the August 1, 2007 meeting, based on his recent dealings with PBHM, Respondents informed Mr. Comstock that Koa Management was going to terminate the Management Agreement and that a termination letter was being drafted at that time. *Tr. at 2087.* Respondents explained the reason for the termination was a combination of many factors – the Japan office incident, the Oceanarium tank debacle, and being "jerked around" with the financials and budget. *Tr. at 2088.*

The very next day, on August 2, 2007, PBHM sent Respondents a letter asking for consent to (a) provide portions of the Management Agreement to the ILWU, and (b) propose a two-year collective bargaining agreement to the ILWU. *See GC-45.* At that time, Respondents were already preparing a letter to terminate the Management Agreement with PBHM and having the letter reviewed by their attorneys. *Tr. at 2116.* According to Mr. Minicola, the termination was based on the arrogance of PBHM, the poor performance of the property, and the decision to stop paying the 2.5% commission to the Japan office. *Tr. at 2118.* The termination was not related to PBHM's letter dated August 2, 2007 in any way. *Tr. at 2119-20.*

During the hearing, PBHM representatives testified they were not surprised by the termination letter. *Tr. at 452.*

In his Decision, the Judge stated Respondents' explanation that they cancelled the management agreement because PBHM did not hit its budget projections was "unimpressive." *Decision at 40.* He reasoned that "preliminary budgets projections were known to be flawed." He then stated "everyone understood, or should have understood, that the previous numbers were estimates and targets[.]" *Id.* For this reason, the Judge rejected Respondents' reason for

terminating the Management Agreement with PBHM. What the Judge does not mention, however, is Respondents selected PBHM to operate the hotel *because* of the "rosy" projections. Based on such rosy projections, Respondents selected PBHM over two other companies that wanted to operate the Hotel. Therefore, Respondents had good reason to hold PBHM accountable for its projections, because it was hired based on the projections. Otherwise, there would be no need for such projections in the first place.

In addition, the Judge also completely ignores the fact that PBHM threatened to stop paying the commission for the Japan office, a move Respondents made clear would be a deal-breaker. In reviewing the record, it is clear Respondents needed to end the Management Agreement; otherwise, PBHM had threatened to stop paying the commissions for the Japan office "immediately."

Therefore, Respondents clearly had a legitimate reason for terminating the Management Agreement. Contrary to the Judge's findings, the Union played no role in Respondents' decision to cancel the Management Agreement. Rather, Respondents cancelled the Management Agreement because PBHM failed to meet its projected budget; finagled the budget to hide its shortcomings; and threatened to halt the operations of the Japan office, despite knowing such action would be a deal breaker.

c. The Judge's Finding that Respondents Were Obligated to Bargain With the Union While PBHM Was the Employer at the Hotel Was Erroneous

Based on the foregoing, Respondents were clearly not the employer of the Hotel employees from January 1 through November 30, 2007 and clearly did not have control over the operations of the Hotel. Therefore, the Judge's finding Respondents were obligated to bargain with the Union during that time is erroneous.

4. The Judge Erred in Finding Respondents Unlawfully Withdrew Recognition From the Union on December 1, 2007

When Respondents replaced PBHM as the operators of the Hotel on December 1, 2007, the Union no longer had the majority support of employees. Therefore, Respondents withdrew recognition from the Union.

Respondents based their withdrawal on several factors – including the lack of employee participation at rallies; the Union's inability to demonstrate majority support; employees going up to Mr. Minicola and constantly telling him they did not want to be a part of the Union; a general consensus amongst the workforce that they did not want to be represented by the Union; and the fact that from the very beginning, the Hotel always had a large contingency of employees that did not want to be represented by the Union. *Tr. at 124-25 & 134.*

Mr. Minicola had countless conversations with many of the Hotel employees, who informed Mr. Minicola they did not want to be represented by the Union. In addition, the employees informed Mr. Minicola that the majority of Hotel employees did not want to be represented by the Union. From speaking with the employees, it was clear the Union had actually lost majority support of the employees.

Therefore, while Respondents as a successor employer may have had a duty to recognize the Union, the Union was entitled to only a rebuttable presumption of majority status. *See MV Transportation*, 337 NLRB 770 (2002). This presumption could be rebutted through a valid decertification, a rival union, employee petition, or other valid challenge to the Union's majority status. *Id.* Additionally, as a successor employer, Respondents could challenge the Union's majority status "at any time." *See Fall River Dyeing and Finishing Corp. v. NLRB*, 482 U.S. 27 (1987).

In this case, the Union's presumption of majority status was rebutted by the employees' overt rejection of the Union, the lack of employee support in union activities, the fact that half of the employees never wanted to be represented by the Union from the very start; and the overt and general consensus of employees that they did not want to be represented by the Union. Therefore, Respondent's withdrawal from the Union was lawful.

5. The Judge Erred in Finding Respondents Had a Duty to Provide Information to the Union While PBHM Was the Employer

The Judge also erred in ruling Respondents violated the Act by not responding to requests for information from the Union in April, August and September 2007. As noted above, Respondents were not the employer of the Hotel employees during that time and were not involved in the negotiations.

As the Supreme Court has noted, *employers* have a duty to provide relevant information to union representative *during contract negotiations. See NLRB v. Truitt Mfrg. Co.*, 351 U.S. 149 (1956). In the present case, Respondents were not the *employer* of the Hotel employees when the requests for information were made by the Union. In addition, Respondents were also not involved in the contract negotiations. The negotiations were solely the responsibility of PBHM. Therefore, Respondents did not have a duty to respond to the Union's requests for information. In addition, Respondents also had no control over the actions of PBHM and were not a joint-employer with PBHM. Therefore, Respondents cannot be held liable for PBHM's failure to respond to the information requests.

In addition, in order for the obligation to furnish information to attach, there must be a request made and the information requested must be relevant to the union's collective bargaining need. *See Saginaw Control & Engineering, Inc.*, 339 NLRB 541 (2003). In his Decision, the Judge ordered Respondents to provide information to the Union regarding the legal relationship

between Respondents and PBHM. Such information, however, is no longer relevant to any negotiations that would occur in the future because PBHM is no longer the employer for the Hotel employees. Therefore, even assuming the Judge could somehow find that Respondents should have provided such information to the Union in 2007, the issue is now moot. For this reason, Respondents request this portion of the Judge's Decision be stricken.

6. The Judge Erred in Finding that Unilateral Changes Made by Respondents Were Unlawful

Similarly, the Judge did not find Respondents were a successor employer when they resumed operations on December 1, 2007. As noted above, while the Judge did not find Respondents to be a joint-employer with PBHM, he also did not issue a ruling on whether he found Respondents to be a successor employer with PBHM. Therefore, that issue appears to be unresolved. If this Board concludes Respondents were not successors to PBHM, all unfair labor practice charges pursued against Respondents under the General Counsel's successor employer theory of liability should be dismissed.

On the other hand, if this Board concludes Respondents were indeed successors to PBHM, it must also conclude that all changes Respondents made to the terms and conditions of employment for the Hotel employees were lawful. First, the General Counsel did not allege that Respondents unlawfully changed the terms and conditions of employment for Hotel employees under its successor employer theory of liability. Therefore, as the Complaint is written, there is no allegation that Respondents unilaterally changed the employees' terms and conditions of employment as a successor employer.

Second – and perhaps this is the reason the General Counsel did not allege Respondents unlawfully changed terms and conditions of employment under its successor theory of liability – Respondents had a right to set the employees' initial terms and conditions of employment as a

successor employer. *See NLRB v. Burns Security Services*, 406 U.S. 272 (1972). The General Counsel even acknowledges so in its post-hearing brief. *See GC Brief at 183.* Therefore, if this Board finds Respondents were a successor employer to PBHM, the unfair labor practice charges alleging Respondents unlawfully changed the Hotel employees' terms and conditions of employment should be dismissed.

7. The Judge Erred in Ruling that Respondents Discharged Seven Employees Because of Union Animus

Respondents had legitimate and non-discriminatory reasons for not rehiring certain employees at the Hotel on December 1, 2007.[8] The Judge, however, found Respondents' reasons for not hiring seven different individuals insufficient or "unpersuasive." *Decision at 38:8.* By reaching this conclusion, the Judge focused on innocuous or circumstantial instances of Union conduct he believed negated Respondents' valid reasons for not hiring certain employees. Such reasoning, however, was erroneous under Board law. *See Merillat Indus.*, 307 NLRB 1301, 1303 (1992)("[T]he defense does not fail simply because not all the evidence supports it, or even because some evidence tends to negate it.").

In addition, it was also improper for the Judge to determine whether Respondents' nondiscriminatory reasons for not selecting certain employees were insufficient or unpersuasive. *See 6 West Limited Corp.*, 330 NLRB 527, n.5 (2000)(the Board does not determine whether a "nondiscriminatory reason for [employment action] is wise or well supported."). Finally, it was erroneous for the Judge to substitute his own business judgment for that of Respondents or act as a "super-personnel" department. *Id.*

In this case, Respondents' reasons for not hiring certain employees were legitimate, non-discriminatory, and necessitated by the state of the economy. Specifically, when Respondents

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[8] Respondents' reasons for not hiring certain employees are discussed in more detail below.

took over operations of the Hotel on December 1, 2007, the economy for the hotel industry was on a severe decline. In addition, the Hawaii tourism industry was also suffering, and it was clear the business at the Hotel would continue to decline. *Tr. at 1519 & 2141.* In previous years, the Hotel operated at approximately 88% occupancy, and was staffed accordingly. *Tr. at 1867.* For 2008, however, the Hotel was projected to operate at approximately 68%, a 20% decrease in occupancy.[9] Logically, because the Hotel's business is based upon occupancy, when the occupancy drops, the Hotel's staffing requirements also drop. *Tr. at 138.* Therefore, when Respondents took over operations of the Hotel in December 2007, staffing at the Hotel needed to be reduced. Tr. at 138. This included reduction of both managerial employees and bargaining unit employees. *Tr. at 121 and 1120.*

First, for managerial employees, 8 out of 62 could not be rehired. *Tr. at 121.*

Second, for bargaining unit employees, positions needed to be cut as well. Respondents needed to determine the staffing levels for each department. *Tr. at 1120.* The staffing levels were based on projected occupancy, as well as the Hotel's budget in terms of revenue and expenses. *Tr. at 2132.* Respondents then developed a six-factor test to help determine which employees should be rehired. *Tr. at 1123.* The six factors were: attitude, job performance, flexibility in scheduling, attendance, customer service and team work. *Tr. at 1123.* Flexibility was important because the hotel was going to run a leaner operation, and therefore, Respondents needed to hire employees who were dependable and could work different shifts. *Tr. at 1123.* Customer service was also important because of recent negative comments from the Far East clientele, and therefore, service needed to be improved. *Tr. at 1123.* Attendance was important because Respondents needed people who were dependable and would not miss work. *Tr. at*

[9] The actual occupancy numbers were lower than expected – at 65%.

1244. Being a team player meant being an employee who got along with others, followed directions, and was flexible in helping others. *Tr. at 1373.* Having a good attitude referred to somebody who had a positive frame of mind. *Tr. at 1373.* This sometimes overlapped with customer service. *Tr. at 1373-74.*

The six-factors were weighed differently for different types of employees. *Tr. at 1124.* For example, some factors were more important for front-of-the-house employees who had a lot of guest interaction, than for back-of-the-house employees who had little guest interaction and customer service was not as critical. *Tr. at 1124 & 1243.*

In *Jerry Ryce Builders, Inc.*, 352 NLRB No. 143 (2008), the NLRB provided that in order to establish a charge of a discriminatory refusal to hire, the General Counsel has the burden of proving the following three elements:

(1) The employer was hiring, or had concrete plans to hire at the time of the alleged unlawful conduct;

(2) Applicants had experience or training relevant to the announced or generally known requirements of the position for hire, or in the alternative, the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and

(3) Antiunion animus contributed to the decision not to hire the applicants.

If the General Counsel is successful in meeting this burden, the employer must show it would not have hired or considered the applicants even in the absence of their union activity or affiliation. *Id.* If the employer asserts the applicants were not qualified for the positions it was filling, the employer has the burden of proving they did not possess the specific qualifications for the position required or that others who were hired had superior qualifications, and that the employer would not have hired them for that reason even in the absence of their union support or activity. *Id.*

In the present case, the General Counsel's arguments – and the Judge's findings – that Respondents discriminated against union supporters were based entirely upon circumstantial evidence. The General Counsel did not provide any direct evidence Respondents' hiring decisions were ever based on an employee's union sentiment, nor did the Judge find any. In addition, there was no evidence Respondents targeted specific individuals or singled out any employees because of their union sentiment. Rather, the Judge's finding that Respondents acted in a discriminatory manner rested solely upon circumstantial evidence, and primarily on the fact that a few of the 40+ employees that were not hired were members of the ILWU's bargaining committee.

At the same time, the General Counsel ignored the fact that the majority of the ILWU's bargaining committee members were in fact hired. Specifically, Bing Obra, Guillerma Ulep, Larry Tsuchiyama, Edison Yago, Cesar Pedrina and Enoch Chong were all rehired as of December 1, 2007. In addition, Keith Kanaiaupuni and Todd Hatanaka were also rehired in early 2008. Two of the ILWU bargaining committee members, Carol Ped and Desiree Hee, did not apply for their jobs. Therefore, out of the 13 bargaining committee members who applied for their jobs, eight were hired.

The five employees who were not hired were either not qualified for their jobs or there was somebody in their department who was more qualified for their jobs. For example, Mr. Villanueva was clearly a sub-par employee. He was prone to taking shortcuts at work to make his job easier for himself and would commit safety violations in the process. He also did not follow proper protocol on more than one occasion in just an eight-month span, which led to guest complaints. Finally, Mr. Villanueva had perhaps one of the worst attendance records in the entire housekeeping department. Therefore, Ms. Ko felt that on top of not being qualified for his

job, Mr. Villanueva was also not reliable or dependable. Therefore, Ms. Ko recommended he not be rehired.

Ms. Recaido also was not qualified to be rehired because she was an insubordinate employee who also was not a good team player. Specifically, Ms. Recaido would speak up against supervisors in the Housekeeping Department in an insubordinate manner and not show any respect for authority. In addition, Ms. Recaido tried to embarrass her co-workers or get her co-workers in trouble by insisting that Ms. Ko tell everybody when an employee made a mistake at work. Ms. Ko thought these were signs of a bad employee, and therefore, recommended Ms. Recaido not be rehired.

Similarly, Mr. Miyashiro was not hired for good reasons as well. As Mr. Lopianetzky explained, Mr. Miyashiro once started a fire in the kitchen which could have led to very serious damage. Mr. Miyashiro received a one-day suspension for the incident, per Mr. Minicola, although Mr. Lopianetzky thought the punishment should have been more severe. In addition, as was evident during the hearing, Mr. Miyashiro still has not accepted responsibility for starting the fire. Specifically, even during the hearing, Mr. Miyashiro testified as though he did nothing wrong, that he blew out the sterno which caused the fire and touched the sterno to make sure it was not hot. This testimony was indicative of Mr. Miyashiro's attitude towards the incident – mainly, he still was not accepting responsibility for the incident. In addition, this testimony was not credible because if Mr. Miyashiro blew out the sterno right before he touched the sterno, it would obviously still be hot. Yet, he tried to testify he blew out the sterno and touched it right after and it was not hot. This testimony was simply not credible.

Mr. Lopianetzky also testified Mr. Miyashiro was continuously harassing one of his co-workers to the point where he made the co-worker cry. Mr. Miyashiro harassed his co-worker so

much the co-worker went crying to Mr. Lopianetzky, asked him to remove her from the banquets she was working, and not mention anything to Mr. Miyashiro. This behavior by Mr. Miyashiro was unacceptable in Mr. Lopianetzky's mind, and therefore, Mr. Lopianetzky recommended he not be rehired.

Finally, although the Judge has essentially concluded Mr. Miyashiro should have been hired over other banquet department employees, the Judge did not provide any evidence to show Mr. Miyashiro was more qualified to be hired than any other banquet employees. Rather, the converse is true – the evidence showed Mr. Miyashiro was not qualified to be rehired because he started a fire in a trash can at work, but did not really take responsibility for the incident, and also was caught harassing a co-worker to the point where he made the co-worker cry and stop working at certain VIP functions. Therefore, under the circumstances, Respondents' decision not to hire Mr. Miyashiro was perfectly reasonable.

Likewise, Mr. Bumanglag also was not qualified to be rehired. First, the two other employees who held the Maintenance I position were more qualified and more flexible in the scheduling than Mr. Bumanglag. Specifically, Mr. Lee was a certified air-conditioning specialist and Mr. Ballateria was able to work at night, whereas Mr. Bumanglag could only work during the day. Second, Mr. Lopianetzky was frustrated with Mr. Bumanglag because he was unable to properly fix equipment at the Hotel. In fact, in one incident, a banquet sous chef was electrocuted after Mr. Bumanglag said the machinery was ready to be used. Mr. Lopianetzky made several complaints to Mr. Emerick, Mr. Bumanglag's supervisor, but Mr. Bumanglag's work continued to be unsatisfactory. Therefore, when it was time to rehire employees and only two positions were available for the Maintenance I position, Mr. Lopianetzky hired Mr. Lee and Mr. Ballateria over Mr. Bumanglag.

Finally, Ms. Revamonte was not able to work and her name was not listed on the work schedule. Therefore, she was not hired. The fact that a Housekeeping employee, Ms. Sabado, who was also on workers' compensation leave but was on the work schedule, was hired was not relevant. First, the decision to hire Ms. Sabado was made by Ms. Ko, whereas the decision to not hire Ms. Revamonte was made by Mr. Lopianetzky. In addition, Ms. Ko was not instructed to not hire any employees who were on leave. Rather, she was simply told to pick six housekeeping employees who would not be rehired, and she used her best judgment to make such a decision. Therefore, while Ms. Ko and Mr. Lopianetzky may have used slightly different criteria in their decision making, both their reasoning was still legitimate and nondiscriminatory.

Clearly, Respondents' decisions for not hiring certain employees were based on legitimate and nondiscriminatory reasons. The Judge, however, has ruled such reasons were not satisfactory. By such reasoning, the Judge has effectively substituted his own judgment for that of Respondents. Such a decision was highly improper under Board law. *See Pro-Tec Fire Services, Ltd.*, 351 NLRB 52 (2007)(noting that the Board may not substitute its own business judgment for that of Respondent in hiring decisions).

8. The Judge's Finding that Respondents "Polled/Interrogated" Employees Was Erroneous

The Judge went to great lengths to explain why Respondents did not satisfy the *Struksnes* safeguards for conducting employee polls. *See Decision at 29.* Specifically, under *Struksnes*, the Board requires an employer to inform employees that the purpose of the poll is to determine the truth of a union's claim of majority and that no reprisals will be made for providing the information. In addition, the poll must be done by secret ballot and the employer cannot commit any unfair labor practices that would create a coercive atmosphere. *See Struksnes Construction Co.*, 165 NLRB 1062 (1967).

In this case, Respondents are alleged to have "polled" employees when they asked employees how they felt about a *boycott* occurring at the Hotel. The Judge ruled that such questions were illegal because they did not satisfy the *Struksnes* polling safeguards. The Judge's ruling was erroneous, however, because no "poll" regarding employees' Union sentiment was conducted in the first place. By asking employees how they felt about a *boycott*, Respondents were not trying to determine whether the majority of employees supported the Union.

Rather, they were simply asking employees about the boycott, because the boycott was hurting business at the hotel. In addition, Respondents knew several employees were upset about the boycott, and they were simply giving the employees an opportunity to voice their concerns. Not all polling is unlawful, and simply asking employees how they felt about the boycott does not constitute an unfair labor practice. *See Blue Flash Express*, 109 NLRB 591 (1954)(polling is unlawful only when it was coercive in light of the surrounding circumstances.).

During the hearing, even the General Counsel's own witnesses testified that while they were asked about the boycott, their Union sentiments were never questioned. For example, Guillerma Ulep testified that the housekeeping employees were told if they didn't agree with the boycott, they can speak with somebody in Human Resources. *Tr. at 957.* Likewise, Jacqueline Taylor-Lee also testified that Oceanarium employees were told if they didn't agree with the boycott, they could talk to somebody in the Human Resources department. *Tr. at 968.*

Clearly, Respondents did not conduct any poll about the employees' Union sentiments, and the Judge's application of *Struksnes* in this situation was misplaced. Accordingly, the unfair labor practice alleging Respondents conducted an illegal polling of employees should be dismissed.

9. The Judge Erred by Finding Respondents Threatened Employees With Job Loss Because Such an Allegation Was Not Part of the Complaint

In this case, the Complaint does not contain any allegations that Respondents threatened employees with job loss. *See GC-1vvvv.* Additionally, the General Counsel has not pursued such an unfair labor practice charge against Respondents in this case. Indeed, the General Counsel's post-hearing brief does not mention or argue that Respondents made any such threats against the Hotel employees. Therefore, there was clearly no pending unfair labor practice charge against Respondents regarding any threats of job loss.

Yet, somehow and for some reason, the Judge still found Respondents committed an unfair labor practice by telling employees they may lose their jobs if the Hotel had to close due to boycotts instigated by the Union. *See Decision at 46:40-44.* As there was clearly no such pending unfair labor practice charge against Respondents, however, the Judge's finding Respondents committed such an unfair labor practice charge is clearly erroneous. Accordingly, Respondents request the Judge's finding on this issue be reversed. Otherwise, if the Judge's finding is not reversed, it would constitute a clear violation of Respondents' due process rights.

C. <u>The Remedies Ordered By The Judge Were Not Warranted</u>

The Judge ordered a series of remedies that were not warranted under the circumstances. First, the Judge's order for Respondents to recognize and bargain with the Union was not appropriate because the majority of hotel employees clearly do not want to be represented by the Union. Therefore, Respondents (and the employees) should not be required to recognize the Union as the exclusive bargaining representative of the Hotel employees. Clearly, the reason the record may not contain sufficient evidence of the Union's loss of majority is because the Judge prevented any such evidence from being introduced into the record.

Second, the extension of certification was also not warranted, because it was (a) inappropriate under the circumstances of this case and (b) violative of the Section 7 rights of a majority of Hotel employees. Third and fourth, the extraordinary remedies and broad cease-and-desist order were inappropriate for the reasons discussed below.

1. The Judge Erred in Ordering Respondents to Recognize and Bargain with the Union

The most obvious and blatant error made by the Judge was to order Respondents to recognize and bargain with the Union. As noted above, the Union is not supported by the majority of Hotel employees, and the employees have expressly stated they do not want to be represented by the Union through the signing of a disaffiliation petition. Therefore, the Judge erred by ordering Respondents to recognize the Union as the exclusive bargaining representative of the employees. At the same time, the Judge also violated the Section 7 rights of the Hotel employees by forcing them to accept representation by a Union they do not support.

In this case, the Judge was "able" to order Respondents to recognize and bargain with the Union by first excluding from the record any evidence regarding the Union's loss of majority status. Specifically, the Judge prevented any and all employees (who wanted to testify they did not want to be represented by the Union) from testifying. This decision was clearly erroneous. Surely, the issue of whether the Union is supported by the majority of employees and should therefore be recognized as the employees' bargaining representative can only be addressed by first hearing from the employees on whether they want to be represented by the Union.

Therefore, in this case, the orders to recognize and bargain with the Union are, for lack of a better term, "tainted." They are based on an incomplete and one-sided record – one where the General Counsel and Union were able to present testimony the Union may have enjoyed majority support at one time, but the Respondents were not able to present their own testimony to the

contrary. To make matters worse, this isn't a case where testimony from employees was admitted into the record and then disregarded; the employees were denied the opportunity to testify in the first place.

The only way to rectify this situation would be to remand this matter and reopen the record for further testimony and evidence. Specifically, the Hotel employees should be able to testify and tell to the Judge whether or not they want to be supported by the Union. In addition, if the Judge were to presume the disaffiliation petition had "taint," he was first required to hear testimony from the employees on the *reason* they signed the petition. *See Pittsburgh and New England Trucking, Co. v. NLRB*, 643 F.2d 175 (4th 1981)(witnesses' testimony that unfair labor practices did not affect their union sentiment was relevant) and *Automated Business Systems v. NLRB*, 497 F.2d 262 (6th Cir. 1974)(in determining whether union had majority status, employer was entitled to introduce number of employee signatures on decertification petition.). Only through having a complete record can the Judge make an informed decision on whether the Union is supported by the majority of employees, and therefore, whether Respondents (and the employees) should still recognize the Union.[10]

2. The Judge Erred by Extending the Certification Period for One Full Year

Despite the fact Respondents have already bargained with the Union for over one year, met with the Union on 36 occasions, reached tentative agreements on 170 different issues, and have only a few remaining issues on which there was no agreement, the Judge ordered Respondents to bargain with the Union for another full year. *See Decision at 47:41-45.* In issuing this order, the Judge states he felt Respondents had never bargained in good faith with the Union. The Judge's reasoning and logic are simply flawed.

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[10] Respondents have filed an accompanying Motion to Remand and Re-Open the Record in this proceeding for the purposes of entering additional evidence into the record.

In determining the length of extensions of certification, the Board considers the nature of the violations; the number, extent, and dates of the collective-bargaining sessions; the impact of the unfair labor practices on the bargaining process; and the conduct of the union during negotiations. *See American Medical Response*, 346 NLRB 1004 (2006). Under these factors, a 12-month extension is clearly not warranted. First, Respondents have already met with the Union for 36 bargaining sessions and have reached agreement on 170 different issues. At this point, as the Judge himself has acknowledged, there are only a few outstanding issues left. Second, while Respondents engaged in hard bargaining on some of the issues, the Union itself has also engaged in hard bargaining. For example, one of the outstanding issues is that of open shop versus union shop. Respondents have insisted on an open shop because the majority of employees do not want to be represented by the Union. The Union, however, has insisted on a union shop (and then offered an agency shop), but for no reason other than to say they have not agreed to an open shop in the past. Clearly, the Union has played a role in the stalemate in negotiations. In addition, several of the open issues were not addressed because the Union suggested the parties defer negotiations on those issues. Therefore, Respondents cannot be blamed for those issues being unresolved.

Finally, the Board must consider the impact a one year extension of the certification period will have on the Section 7 rights of the Hotel employees. As noted throughout this brief, the majority of employees clearly expressed they do not want to be represented by the Union – by signing a disaffiliation petition. Although the petition itself has not been admitted into the record, there does not appear to be a dispute as to whether the petition exists. Indeed, one of the purposes of Respondents' exceptions is to allow testimony and evidence of the petition to be admitted into the record.

Nevertheless, given the likelihood the employees will want to exercise their Section 7 rights to reject the Union in the future, this Board should take great care in extending the certification year for too long. *See American Medical*, supra, at 1005. Specifically, in *American Medical*, the Board stated:

> Extension of the certification year essentially forecloses, for that extended period, the employees' exercise of their Section 7 right to reject the Union or to choose another union. Because it has such a restrictive effect on the employees' central rights under the Act, the Board must act with care and precision when asked to extend the certification year.

Id. at 1005. Thus, in *American Medical*, the Board rejected the Judge's decision to extend certification for one year, and reduced the certification period to 3 months instead.

The General Counsel may argue that a shorter certification period will encourage Respondents to engage in surface bargaining and wait for the shorter certification period to expire, so the employees may file a decertification period. Therefore, the General Counsel may argue a longer certification period is necessary. Such an argument, however, would be flawed. First, as the Board noted in *American Medical*, in order to decertify the Union, the employees would need to submit a new petition and a whole new set of signatures in order to decertify the Union. Therefore, any petition that has already been signed by the employees cannot be used to decertify the Union in the future. *Id. at 1006.* Second, the Board cannot presume Respondents will bargain in bad faith. Rather, the Board "will presume innocence as to future actions, not guilt." *Id. at 1006.*

Therefore, in this case, a shorter extension period is more appropriate than the maximum 12-month extension. If this Board follows the decision in *American Medical*, a 3-month extension would be appropriate. In the alternative, at the very most, a 6-month extension may be appropriate under *Dominguez Valley Hospital*, 287 NLRB 149 (1987). In *Dominguez Valley*

Hosp., the Board rejected the Judge's decision to extend certification for one full year, and ordered a 6-month extension instead. In that case, the Board ruled that a 6-month extension was appropriate in light of respondent's premature withdrawal from the union. In addition, the Board also considered the impact the extension would have on the employees. Specifically, the Board noted "such a 6-month extension will provide the parties with a reasonable interval in which to resume negotiations and, possibly, reach an agreement, without saddling employees with a bargaining representative they may no longer support." *Id. at 151.*

3. The Judge Erred in Issuing Extraordinary Remedies in This Case

The Judge issued a series of extraordinary remedies in this case, but such extraordinary remedies were clearly not warranted or necessary. As the Board has noted, extraordinary remedies are reserved for situations where a respondent's unfair labor practices are "so numerous, pervasive, and outrageous" that such remedies are necessary to "dissipate fully the coercive effect of the unfair labor practices found." *See Federated Logistics & Operations*, 340 NLRB 255 (2003), quoting *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995). Therefore, decisions to order extraordinary remedies have been carefully scrutinized by the Federal courts of appeals. *See e.g. NLRB v. Villa Avila*, 673 F.2d 281 (9th Cir. 1982).

Under this standard, extraordinary remedies were clearly not warranted against Respondents. First, as discussed throughout this brief, Respondents did not commit the alleged unfair labor practices. For example, Respondents did not bargain in bad faith and did not bargain with the intention not to reach an agreement. To the contrary, Respondents engaged in fruitful negotiations with the Union which led to agreement on 170 different issues and disagreement on just a few. Second, the Judge's reliance on repeated statements by Mr. Minicola that the Union won by only one vote cannot be attributed to having union animus. Clearly, Mr. Minicola made such statements in negotiations, where the issues of open shop versus union shop and dues

deductions were being discussed. Third, even if, assuming *arguendo*, Respondents did commit the alleged unfair labor practices, such conduct would not warrant an imposition of extraordinary remedies. The General Counsel has not established traditional remedies are insufficient to address the alleged unfair labor practices, and therefore, the Judge could not have found Respondent's conduct warranted extraordinary remedies under the circumstances.

In addition, the Judge erred by ordering Respondents to pay costs and expenses incurred by the Union in the preparation and conduct of collective bargaining negotiation sessions. This order is absurd and contrary to Board law. Specifically, the Board has ruled negotiating costs are warranted where an employer "engaged in flagrant, egregious, deliberate and pervasive bad-faith conduct aimed at frustrating the bargaining process, causing the union to waste its resources in a futile effort to bargain for an agreement, and rendering the bargaining between the parties "merely a charade." *See Frontier Hotel & Casino*, 318 NLRB 857, 858 (1995), enfd. in relevant part sub nom, *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. 1997). In *Frontier Hotel*, the Board held that a respondent can be required to reimburse a charging party for negotiation expenses if it engaged in unusually aggravated misconduct, and where it may fairly be said that a respondent's substantial unfair labor practices have infected the core of the bargaining process to such an extent that their effects cannot be eliminated by the application of traditional remedies. *Id. at 859.*

Applying that principle to the present case, the record fails to establish an award of negotiating costs to the Union is warranted. Respondents have not engaged in flagrant, egregious, deliberate or pervasive bad-faith conduct aimed at frustrating the bargaining process or causing the Union to waste its resources in a futile attempt at collective bargaining. Nor does the record show that Respondents' bargaining was merely a charade. Rather, the record shows

Respondents met and bargained with the Union for over one year, met for 36 negotiation sessions, reached agreement on 170 different issues, and were unable to reach agreement on just a few remaining issues. Clearly, the negotiation sessions were fruitful and the parties made significant progress through the negotiation sessions. In fact, there is no way the Union can honestly argue the negotiations sessions were not fruitful; the Union cannot deny the negotiation sessions led to 170 tentative agreements which the Union signed. Similarly, the General Counsel also cannot, in good faith, argue Respondents should pay the Union's costs. Indeed, in the General Counsel's own post-hearing brief, it seeks an order requiring Respondents "to honor all tentative agreements previously reached between Respondents and the Union[.]" *See General Counsel's Post-Hearing Brief at 184.* Surely, even the General Counsel must agree the tentative agreements have value, otherwise they would not seek to have Respondents recognize the tentative agreements. Therefore, it is disingenuous for the General Counsel to seek an order requiring Respondents to accept all 170 tentative agreements, but also pay the Union's negotiation costs for 36 bargaining sessions (wherein the parties reached agreement on the 170 tentative agreements).

4. The Judge Erred in Issuing a Broad Cease and Desist Order

Likewise, based on the circumstances of this case, a broad cease and desist order was definitely not warranted. Specifically, in *Hickmott Foods*, 242 NLRB 1357 (1979), the Board explained the criteria for determining whether a broad cease and desist order is appropriate is as follows: "Such an order is warranted *only* when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental rights." (Italics added.) In *Five Star Manufacturing, Inc.*, 348 NLRB 1301 (2006), the Board added that the *Hickmott* test is also based on "the totality of circumstances." Moreover, in order to justify a broad cease and desist

order, the Board must find that traditional remedies, including a narrow cease and desist order, are insufficient to address any violations by respondent. *See Amptech, Inc.*, 342 NLRB 1131 fn.3 (2004) enfd. (165 Fed. Appx. 435 (6th Cir. 2006)(rejecting request for broad cease and desist order.).)

In the present case, a broad cease and desist order was definitely not warranted. First, Respondents' conduct did not demonstrate a proclivity to violate the Act. Second, and more importantly, however, Respondents have not acted in a way that disregarded the employees' fundamental rights – in fact, quite the opposite is true. The employees have made it abundantly clear they do not want to be represented by the Union. Therefore, Respondents have simply acted accordingly. Third, there has been no showing that the traditional remedies are insufficient to remedy any violations by Respondent.

Finally, in a very recent case with more egregious facts than our own, the Board held that the "circumstances of the case did not warrant a broad cease and desist order," where respondent interrogated employees, solicited employees to sign decertification petitions, promised wage increases if employees repudiated the union, withdrew recognition from the union, failed to provide information to the union, and unilaterally changed terms and conditions of employment following withdrawal of recognition. *See Bentonite Performance Material, LLC*, 353 NLRB No. 75 (2008).

Clearly, the violations found in *Bentonite* are more severe and egregious than the violations alleged in the instant case. Yet, the Board found that a broad cease and desist order was not warranted under the circumstances in *Bentonite.* Accordingly, a broad cease and desist order is also not warranted in the instant case. *See also Ryan Iron Works, Inc.*, 332 NLRB 506 (2000)(reversing judge's decision to issue broad cease and desist order because respondent has

not been shown to have a proclivity to violate the act or a general disregard for employees' fundamental statutory rights.).

III. CONCLUSION

For the foregoing reasons, Respondents take exception to several of the findings and conclusions in the Judge's Decision. In addition, through their exceptions and the accompanying Motion to Remand and Reopen the Record, Respondents also seek an opportunity to present additional evidence regarding the Union's loss of majority support.

For further argument on this matter, please refer to Respondents' Motion to Remand and Reopen Record filed on this same date.

DATED: Honolulu, Hawaii, October 28, 2009.

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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20, SUBREGION 37

HTH CORPORATION, PACIFIC BEACH CORPORATION, and KOA MANAGEMENT, LLC, a SINGLE EMPLOYER, dba PACIFIC BEACH HOTEL, Respondents, and HTH CORPORATION dba PACIFIC BEACH HOTEL, and KOA MANAGEMENT, LLC dba PACIFIC BEACH HOTEL, and PACIFIC BEACH CORPORATION dba PACIFIC BEACH HOTEL, and INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142, Union.	CASE NOS.: 37-CA-7311 37-CA-7334 37-CA-7422 37-CA-7448 37-CA-7458 37-CA-7476 37-CA-7478 37-CA-7482 37-CA-7484 37-CA-7488 37-CA-7537 37-CA-7550 37-CA-7587 CASE NO.: 37-CA-7470 CASE NO.: 37-CA-7472 CASE NO.: 37-CA-7473 **CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2009, the foregoing RESPONDENTS' EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION; RESPONDENTS' BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S

DECISION; CERTIFICATE OF SERVICE was electronically filed with OFFICE OF EXECUTIVE SECRETARY in Washington, D.C., and a copy of the same was hand delivered to:

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